7020-02

INTERNATIONAL TRADE COMMISSION

Notice Regarding Post Employment Restrictions for Former Employees Seeking to Appear in Sequential Five-Year Reviews Stemming from the Same Underlying Original Title VII Investigation

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given of a clarification in agency practice regarding appearances by former Commission employees in multiple five-year reviews stemming from the same underlying Title VII investigation. Former employees of the U.S. International Trade Commission ("Commission") may now represent a party in a five-year review conducted under title VII of the Tariff Act of 1930 even if they participated personally and substantially in an earlier five-year review of the same corresponding underlying original title VII investigation while a Commission employee. The five-year review is not the same particular matter as the underlying original investigation and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for the purpose of applying post employment restrictions. In addition, former employees seeking to appear in a later five-year review will no longer be required to seek approval to appear before the Commission, pursuant to Commission rule 201.15(b) (19 CFR 201.15(b)), even if the underlying original investigation or an earlier review had been pending when they were employed by the Commission.

FOR FURTHER INFORMATION CONTACT: Carol McCue Verratti, Esq., Deputy Agency Ethics Official, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-3088. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD

terminal at (202)205-1810. General information concerning the Commission can also be obtained by accessing its Internet server (http://www.usitc.gov).

SUPPLEMENTARY INFORMATION: The Commission's authority to issue this notice is based on 19 U.S.C. 1335 and 5 CFR part 2638.

Under Title VII of the Tariff Act of 1930, as amended (19 U.S.C. 1671 et. seq. and 1673 et. seq.), U.S. industries may petition the U.S. Department of Commerce ("Commerce") and the Commission for relief from imports that are sold in the United States at less than fair value ("dumped") or that benefit from countervailable subsidies provided through foreign government programs. If Commerce and the Commission make final affirmative determinations that dumped and/or subsidized imports are injuring or threaten to injure a domestic industry in the United States, an antidumping duty or countervailing duty order will be issued. For the purposes of this notice, such investigations are considered to be "underlying original investigations."

In 1994, Congress passed the Uruguay Round Agreements Act, which added the requirement to Title VII of the Tariff Act of 1930 that five years after the date of publication of a countervailing duty order, an antidumping order, or a notice of suspension of an investigation, Commerce and the Commission shall conduct a review to determine, in accordance with 19 U.S.C. 1675(c), whether revocation of the countervailing or antidumping duty order or termination of the investigation suspended under 19 U.S.C. 1671c or 1673c would likely lead to continuation or recurrence of dumping or a countervailable subsidy and material injury. The statute also requires that reviews be conducted every five years unless the determination to

revoke the duty order or terminate a suspended investigation has already been made. The statute, 19 U.S.C. 1675a, mandates that certain information and factors be considered by Commerce and the Commission respectively in reaching their review determinations. 19 U.S.C. 1675a(a)(1)(A) requires the Commission to take into account, among other factors, "its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued or the suspension agreement was accepted." In compliance with this provision, the Commission adds to the record of the review the Commission's published opinion and the Commission's staff report from the final phase of each original investigation.

Beginning in 1996, when questions were first raised about the effect of post employment laws and regulations on former employees seeking to represent parties in five-year reviews, the Commission's Designated Agency Ethics Official ("DAEO") advised former employees, after consideration of the relevant post employment and title VII statutes and regulations and consultation with the U.S. Office of Government Ethics ("OGE"), that the five-year review would be considered the "same particular matter" as the underlying original investigation for the application of the post-employment law, 18 U.S.C. 207, and Commission rule 201.15(b) (19 CFR 201.15(b)). This view that a five-year review and its original underlying investigation are the same particular matter was primarily based on the expectation that the records of the review and underlying original investigation would involve the same basic facts and the same confidential information, two of the factors listed in OGE's regulations to be considered when determining if two matters are the same. 5 CFR 2641.201(h)(5). Thus, a former employee who had worked personally and substantially on an underlying original investigation while a

Commission employee could not represent a party in the corresponding five-year review after leaving the Commission. In addition, because the underlying investigation and the review were considered to be the same matter under 19 CFR 201.15(b), former employees who worked at the Commission while the underlying investigation was pending, even if they did not work on that investigation, were required to seek Commission approval to appear in such review.

As a result of the Commission's experience in administering the five-year review provisions of the law, and more specifically the experience in the second set of five-year reviews, which commenced in 2004, the Commission's DAEO reassessed the previous advice given to former employees and determined that an underlying original investigation should no longer be considered to be the same particular matter as any five-year review of the corresponding order. This conclusion was reached after consultation with the OGE which, on March 27, 2008, issued an informal advisory letter ("2008 Opinion") concluding that "first, second and subsequent reviews are not the same particular matter involving specific parties as the underlying original investigation leading to the original order." Subsequently, the Commission issued a *Federal Register* notice on May 5, 2008, 73 FR 24609, stating the DAEO's conclusion that five year reviews are no longer considered the same particular matter as the underlying original investigation. The notice also indicated that former Commission employees would no longer need to seek permission to appear in a five-year review from the Commission, pursuant to 19 CFR 201.15, even if the original underlying investigation had been pending during their employment with the Commission.

After the question of whether five-year reviews were the same particular matters as the

underlying original investigation was resolved in 2008, former Commission employees have raised the additional question as to whether sequential five-year reviews of the same underlying original investigation are the same particular matters as each other. For example, if a former employee, before leaving the Commission, participated in the first five-year review, would that former employee be able to participate in the second or third five-year review after leaving the Commission in light of the post-employment restrictions in 18 U.S.C. 207.

The original view that a five-year review and its original underlying investigation are the same particular matter was formed early in the conduct of the five-year reviews. By 2008, however, the Commission had conducted more than 175 reviews. With regard to the factors outlined in OGE's regulations defining "same particular matter," experience had shown that a review differs in important respects from the underlying original investigation. In particular significant changes often have occurred in the markets and industries during the lapse of time between the original investigation and the review.

In five-year reviews, the Commission must take into account the volume, price effect, and impact of the subject imports on the industry before the order was in place. However, the Commission's experience has been that most of the key information for making the required forward-looking determination is the most current information developed on the record as part of the five-year review process.

When making his determination that five-year reviews of the same underlying original investigation are all different particular matters, the DAEO considered issues such as whether

expedited and full reviews should be distinguished or whether the five-year reviews should all be considered the same particular matter. The DAEO's conclusion that neither five-year reviews nor the underlying original investigation are the same particular matter was based on a number of factors. First, those factors listed in OGE's regulations defining "same particular matter" support the finding. OGE's regulations provide that "all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed." 5 CFR 2641.201(h)(5). The analysis used by the Commission in reviews relies primarily on the newly developed record to determine not what has happened in the past but rather what is likely to happen if the order under review is revoked. The focus in the reviews is generally not the information from the record of the original investigation or previous reviews, but rather new information developed for the record of the current five-year review. Five years elapse between each review, during which economic and marketplace developments can change the basic facts and confidential information considered by the Commission. In the five years between reviews, the identity of the relevant parties, such as domestic and foreign manufacturers and purchasers, could also change. The DAEO also considered the fact that each review of an underlying original investigation is treated as a different case upon judicial review.

In accordance with the DAEO's interpretation of both the statute and the Commission's experience in five-year reviews, appearances of former employees in Commission five-year reviews will be treated under 18 U.S.C. 207 as appearances that are not in the same particular matter as either the underlying investigation or any other five-year review stemming from the same underlying original investigation. In addition, the Commission has traditionally applied 19

U.S.C. 201.15(b) consistently with the application of 18 U.S.C. 207, and therefore, for that provision, will not consider a review to be the same matter as the underlying original investigation or any other review based on that underlying investigation. Consequently, former employees no longer need to seek approval from the Commission to appear in a review even if the underlying original investigation or an earlier review of the underlying investigation had been pending while they were employees.

By order of the Commission.

Lisa R. Barton
Acting Secretary to the Commission

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